

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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4 ROGER BIRDBEAR, et al.,)

5 Plaintiffs,)

6 vs.) Case No.

7 THE UNITED STATES OF AMERICA,) 16-75L

8 Defendant.)

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13 Suite 705

14 Howard T. Markey National Courts Building

15 717 Madison Place, N.W.

16 Washington, D.C.

17 Friday, March 24, 2017

18 11:00 a.m.

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22 BEFORE: THE HONORABLE ELAINE D. KAPLAN

23

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25 Transcribed by: George Quade, CERT

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3/24/2017

1 APPEARANCES:

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23 ALSO PRESENT:

24 Holly Clement, Esq., Department of Interior

25 Sean Gaines, DOJ IT Project Manager

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1 P R O C E E D I N G S

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3 (Proceedings called to order at 11:00 a.m.)

4 THE COURT: All right. This is a status
5 conference in Birdbear v. The United States, Number 16-
6 75. I read the joint status report, and I just had a
7 couple of questions to ask so I can figure out where
8 things are, at least with respect to the stipulation that
9 you all entered.

10 So I still can't tell -- I can't tell, Mr.
11 Smith, from your part of the joint status report whether
12 you view the Government as now having supplied Plaintiff
13 with everything that was required by the stipulation you
14 all entered. Mr. Smith?

15 MR. SMITH: Your Honor, the -- we got, you
16 know, virtually all the documents. It was a flurry of
17 seven emails and two disks the day the joint status
18 report was due, and the last one was at 6:30 at night.

19 THE COURT: Right.

20 MR. SMITH: And we were still going through it
21 at -- when we prepared the joint status report. We've
22 gone through it, and that -- that day I had emailed Ms.
23 Schwarz about three documents that were still missing.
24 And she indicated that they would be provided, and they
25 have not been provided. So to the best of our knowledge,

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1 there are three documents -- one lease, one
2 communitization agreement, and one assignment -- that, to
3 the best of our knowledge, have not been produced.

4 THE COURT: All right. And, Ms. Schwarz, is
5 that correct?

6 MS. SCHWARZ: I don't believe so, Your Honor.
7 We went through -- as Mr. Smith said, we went through all
8 of his emails. He had followup emails regarding
9 documents Interior from the -- they had followup emails
10 regarding the contents as documents, and we -- you know,
11 it's my understanding that we produced everything in
12 response to --

13 THE COURT: What about these three particular
14 documents that he's just mentioned?

15 MS. SCHWARZ: I do not know. They -- he sent
16 me an email about a communitization agreement. We
17 responded with the Bates numbers where it was located.
18 There's a couple leases. We provided those leases. And,
19 also, the assignment, if Mr. Smith wants to email me
20 those documents again so that we can find them in the
21 production, you know, we're more than willing to do that.

22 THE COURT: Okay. Yes, Mr. Smith?

23 MR. SMITH: Yeah. This was a -- on the date of
24 the status report, I emailed her. On that morning, or
25 actually the afternoon, Ms. Schwarz had produced the

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1 title status report for Tract 473. And in that were the
2 list of the -- an oil and gas lease, for Whiting, a
3 communitization agreement for Exteo Energy and an
4 assignment, and she responded that day saying she would
5 produce them by email. That was a week ago, and we have
6 not -- we have not had any response since that time. So,
7 Ms. Schwarz, those are the ones I'm referring to.

8 THE COURT: All right, Ms. Schwarz, can you
9 follow up on that and get those to them?

10 MS. SCHWARZ: I can do that, Your Honor.

11 THE COURT: Okay. Let me just ask you another
12 thing, Ms. Schwarz. You know, I did put in a March 9th
13 deadline for the Government to produce the documents, and
14 apparently the deadline wasn't met. I'm just wondering
15 why you didn't think you should maybe file a request to
16 extend the deadline?

17 MS. SCHWARZ: We met that deadline. We -- you
18 know, we did a -- for the documents that were under the
19 stipulations, we produced those documents two weeks ahead
20 of time in order to give Plaintiff the opportunity to
21 look at them and to let us know by the production
22 deadline if they thought that there was anything wrong
23 with them.

24 Further, the specific email production that
25 counsel refers to from March 9th, the one that we did

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1 send later, was not part of the stipulation. It was
2 related to letters that counsel had sent to us. I
3 believe the date was February 12th regarding a temporary
4 right-of-way for a water line that had been put on one of
5 his Plaintiff's tracts.

6 We, as a courtesy, even though rights-of-way
7 are not at issue in the lawsuit, this is not at issue in
8 the lawsuit, the Department of the Interior followed up
9 and provided them information regarding those temporary
10 water lines that were put on those two tracts and gave
11 them information about a notice of trespass that had been
12 sent out and sent an explanation as to why they did not
13 determine that the other tracts had been subject to
14 trespass.

15 THE COURT: All right.

16 MS. SCHWARZ: And, so, those particular
17 documents had nothing to do with the supplemental
18 production. To the extent that Plaintiff pointed out
19 things in the supplemental production, it wasn't because
20 we had any attempts to not follow the Court's order, but
21 rather those were -- this is a very large production of
22 documents coming from different places at different
23 times. And, so, to the extent Plaintiff raised issue
24 with them, we followed up as quickly and expediently as
25 we possibly could.

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1 THE COURT: Okay. Well, Mr. Smith, I could
2 give you a chance to respond to that, and you might say
3 that the right-of-way agreements were covered by the
4 stipulation, but I'd rather actually just kind of move
5 forward on this. I get that there have been a lot of
6 hiccups here, and it seems like some dropping of the ball
7 between the Government and the Department of the Interior
8 -- excuse me, the Department of the Interior is part of
9 the Government -- between the Justice Department and the
10 Department of the Interior. But it sounds like other
11 than the three documents that are -- we discussed
12 earlier, that at least the stipulation has now been
13 fulfilled and we can move forward with formal discovery.

14 Am I correct about that, Mr. Smith?

15 MR. SMITH: Yeah, you know, and if I could just
16 speak, you know, this has been extremely frustrating --

17 THE COURT: Right.

18 MR. SMITH: -- to say the least. It seems like
19 it's without a deadline, and Ms. Schwarz is simply wrong.
20 We've been sending the same list of documents and
21 letters, November 30th, December 6th, January 12th,
22 February 13th, and then again in early March, the same
23 list of 35 to 40 documents. And after the February 6th
24 conference, we got -- between that and your March 9th
25 order, we got five of those documents. The rest we all

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1 received the day of the status report in this flurry of
2 emails and document productions.

3 And that is frustrating, when they disregard
4 the stipulation and disregard this Court's order. And
5 it's been expensive for our clients to undergo that kind
6 of -- those kind of delays. And I'll just put that out
7 there.

8 THE COURT: All right. I understand what
9 you're saying. Let me ask you a question, Mr. Smith.
10 The amended complaint lists about 89 tracts of land in
11 which the Plaintiffs have an interest. I think that's at
12 paragraph 28. Do we know yet whether that list is
13 complete?

14 MR. SMITH: To the best of our knowledge, that
15 is a complete list of the properties.

16 THE COURT: Okay. And have you received all of
17 the lease agreements that cover those tracts of land as
18 part of the stipulation?

19 MR. SMITH: Except for the ones that I
20 mentioned earlier on this call.

21 THE COURT: Okay, okay. Okay. And let me ask
22 you another question, Mr. Smith. Have you -- I know you
23 issued a bunch of third-party subpoenas. And have you
24 been having -- have you been receiving responses back
25 from the third parties, I mean, other than EOS, which has

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1 filed a motion to quash?

2 MR. SMITH: We -- and I don't know the exact
3 number. We had issued about ten third-party subpoenas.
4 A number of those were no longer lessees or provided some
5 documentation. But the primary ones are EOG and
6 Enerplus.

7 THE COURT: EOG, I'm sorry, yeah.

8 MR. SMITH: Yeah. And my thought was to, now
9 that we had these documents, to -- and have a better idea
10 of who was leasing which properties, were to go back and
11 talk to them and see if we can't maybe refine those, if
12 they are interested in having those discussions.

13 THE COURT: Okay. All right. So you might --
14 you're saying you're going to go back to them and talk
15 about potentially narrowing the request?

16 MR. SMITH: Yeah, narrowing the request. Now
17 that we know who was actually leasing --

18 THE COURT: Yeah, okay.

19 MR. SMITH: -- each particular allotment.

20 THE COURT: Okay. All right. I think that's a
21 good idea. Great.

22 All right. So the formal discovery process has
23 started now, and I'm wondering if I should sort of set us
24 up on a every two months or so -- every 60 days or so
25 that we just have a status conference to make sure

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1 everything is moving smoothly.

2 Ms. Schwarz or Mr. Smith, do you have any
3 thoughts about that?

4 MR. SMITH: I think that would be -- I'm sorry.

5 THE COURT: Sorry, I should have identified one
6 of you. I always forget I'm on the phone.

7 Mr. Smith, why don't you go ahead.

8 MR. SMITH: Yes, that would be fine with us,
9 Your Honor.

10 THE COURT: Okay. And, Ms. Schwarz?

11 MS. SCHWARZ: That would be fine with us.

12 THE COURT: Okay.

13 MS. SCHWARZ: We would like to have a meet-and-
14 confer and will talk to Mr. Smith afterwards today about
15 they have served their -- you know, their first set of
16 interrogatories and request for production. So we wanted
17 to talk to them about, you know, scheduling some of the
18 production and receipt of documents, and also emails to
19 get the search terms.

20 THE COURT: Okay. All right. Sounds -- Mr.
21 Smith, did you want to say something?

22 MR. SMITH: No, that sounds good with us.

23 THE COURT: Okay, all right. So it sounds like
24 we're on hopefully a good track now, despite the bumps
25 over the last year or so. So I will issue an order today

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1 that just sets up the schedule for status conferences and
2 maybe status reports every 60 days.

3 All right. Is there anything else?

4 (No response.)

5 THE COURT: Okay. I don't hear anything.

6 Well, thank you guys very much. Bye-bye.

7 MS. SCHWARZ: Thank you, Your Honor.

8 MR. SMITH: Thanks.

9 (Whereupon, at 11:12 a.m., the hearing was
10 adjourned.)

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3 I, George Quade, court-approved reporter,
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10 DATE: 6/8/2017 s/George Quade
11 GEORGE QUADE, CERT

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